

No. 89-1103

Supreme Court, U.S.

FILED

FEB 7 1990

JOSEPH F. SPANIOLO, JR.
CLERK

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1989

GOULD INC., GOULD MARKETING,
INC., HOFFMAN EXPORT CORP.
and GOULD INTERNATIONAL, INC.,

Petitioners,

vs.

MINISTRY OF DEFENSE OF THE
ISLAMIC REPUBLIC OF IRAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case involves the enforcement in the United States courts of an unpaid arbitral award against Gould resulting from the initiation by Gould of an arbitration proceeding in the Iran-United States Claims Tribunal. The courts below have held that the award may be enforced by means of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). Gould has raised two questions against these holdings. Analytically each seems to break into two parts, as follows:

I.

1. Was the arbitration conducted pursuant to a voluntary written arbitration agreement as required by

the Convention?

2. Was Gould "required" to submit its claims to the Iran-United States Claims Tribunal?

II.

1. Is the award "made in the territory of another Contracting State"?

2. Is an award rendered by the Iran-United States Claims Tribunal enforceable when the validity of the award cannot be challenged or established under that country's municipal law?

A third question has been raised by Gould's actions in this matter:

III. Is Gould estopped from raising the issue of the validity of the award

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under Dutch law because it failed to
raise it in a timely manner in the
proper forum, the Netherlands?



LIST OF PARTIES AND RULE 28.1 LIST

All parties to the present proceeding are Gould, Inc., Gould Marketing, Inc., Hoffman Export Corporation, Gould International, Inc. and Does one through ten as petitioners for a writ of certiorari; and Ministry of Defense of the Islamic Republic of Iran, responding. Gould indicates that Hoffman Export Corporation was merged into Gould International, Inc. on January 27, 1978; that on October 3, 1988, Nippon Mining Co., ltd. acquired 96% of Gould, Inc. outstanding stock and that Gould, Inc. has two not wholly owned subsidiaries: Barnes/Sightmaster Ltd. (Rhode Island) and Clevite de Mexico, S.A. de C.V. (Mexico).



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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On November 16, 1981, Hoffman Export Corporation ("Hoffman") brought two separate claims against Respondent herein before the Iran-United States Claims Tribunal ("Tribunal") for breach of contract. The Tribunal had been established pursuant to the Algiers Accords¹. The claims, numbered 49 and 50,

¹As used herein, "Algiers Accords" or "Accords" refers to the Declaration of the Government of the Democratic and Popular Republic of Algeria, January 19, 1981 Department of State Bull. No. 2047, Feb. 1981 at 2, 1 Iran-U.S. C.T.R.3 (1983) ("General Declaration") and the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981, Department of State Bull. No. 2047, February 1981 at 3, 1 Iran-U.S. C.T.R.9 (1983) ("Claims Settlement Declaration")

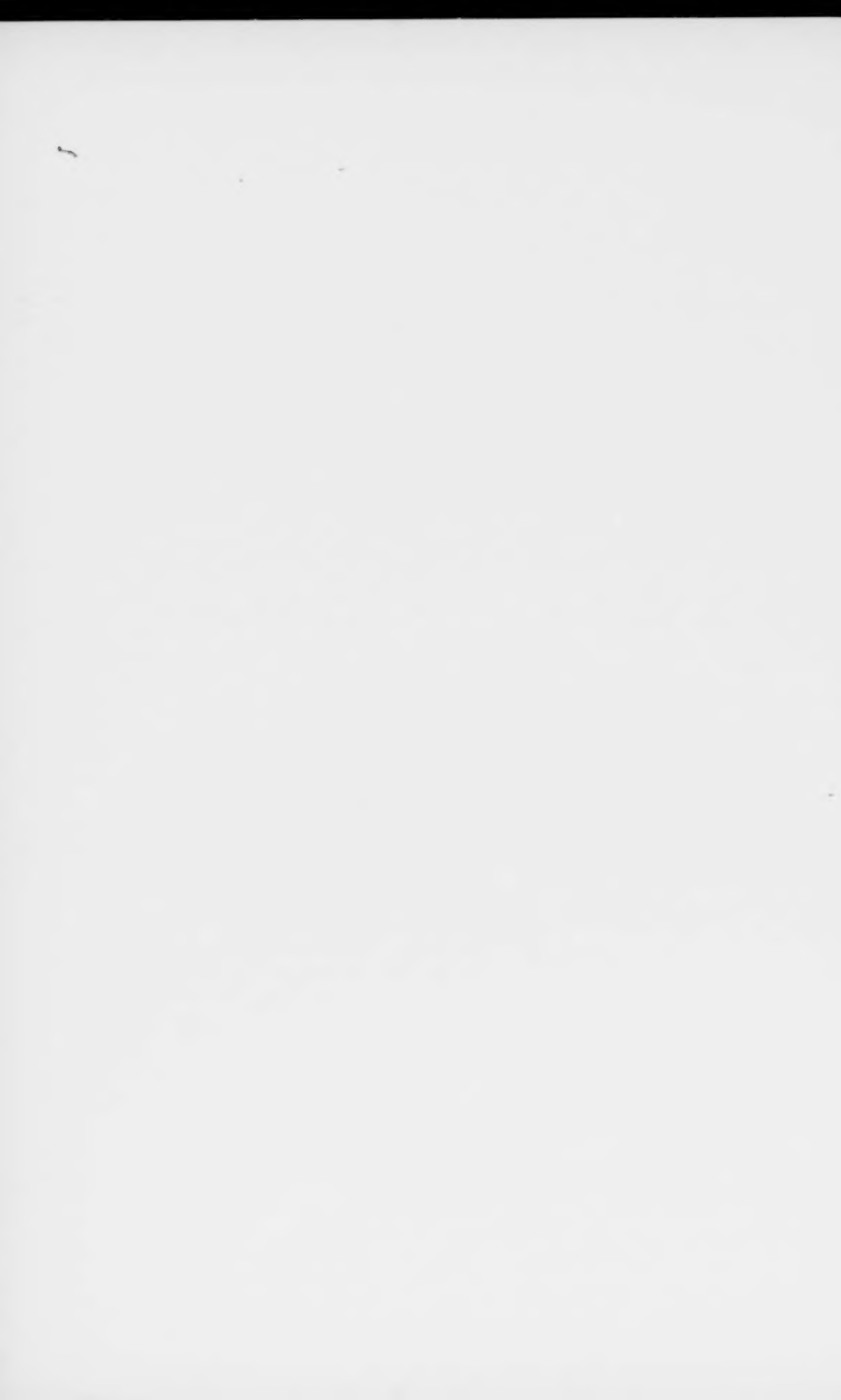
respectively, were under the name of HOFFMAN EXPORT CORPORATION, A DIVISION OF GOULD, INC. of El Monte, California. Hoffman, as claimant, identified itself variously throughout the proceedings as "a Division of Gould Inc.", "a subsidiary of Gould, Inc." and as "Gould Marketing, Inc., as successor to Hoffman Export Corporation" ("Gould Marketing").

Iran answered in defense of the claim and filed a counterclaim against the claimant. The two cases, though initiated separately, were decided jointly by the Tribunal. The Tribunal awarded Iran the net amount of US\$3,640,247.13.

Hoffman, at the time it brought the actions, had already been merged into Gould Marketing, Inc. and began signing

its papers as Gould Marketing, Inc., as successor to Hoffman. When Hoffman was merged into Gould Marketing, Inc., a number of other corporations were also merged. The shares held by the stockholders of Hoffman and the other corporations were converted to shares not in Gould Marketing, Inc. but in Gould International, Inc. Hereafter, Petitioner herein will be referred to as "Gould", and Respondent herein will be referred to as "Iran".

The award of the Tribunal was made against Hoffman and Gould Marketing. On June 9, 1987, Iran filed a Petition in the United States District Court for the Central District of California seeking confirmation of the award against those



named therein and against their successors and real parties in interest alleging jurisdiction under the Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 entered into force for the United States December 29, 1970, 21 U.S.T. 2517, TIAS 6997, (hereinafter referred to as the "Convention"), implemented in 9 U.S.C. §§201-208, and under 28 U.S.C. §1331.

Gould filed a motion to dismiss the Petition in the District Court. The motion, contrary to petitioner's characterization of the court's action in the Statement of the Case portion of the Petitions filed with this court, was denied in toto. Both parties then petitioned the District Court for

Certification for interlocutory appeal. Certification was granted, the 9th Circuit accepted the Appeal. Gould et al appealed the court's jurisdiction contending that Iran could not bring that action under the terms of the Convention and 9 USC §§201-208. Iran, on the other hand, appealed the District Court's finding that it lacked jurisdiction under 28 USC §1331.

The United States Justice Department filed an amicus curiae brief supporting the position of Iran and argued that both 9 U.S.C. §§201-208 and 28 USC §1331 conveyed jurisdiction for the District Court to hear Iran's petition for an order confirming the arbitral award.

The Court of Appeals found for Iran by affirming the District Court's holding



that the Convention and 9 USC §§201-208 conveyed jurisdiction but did not rule on Iran's cross appeal regarding the 28 USC §1331 issue. Gould's petition for a writ properly only concerns the decision of the Court of Appeals regarding the Convention and Gould's apparent argument about 28 U.S.C. §1331 addresses matters not at issue here.



SUMMARY OF THE ARGUMENT

The Convention requires that an award enforceable under its terms be the result of proceedings pursuant to a written arbitration agreement. Gould initiated the proceedings with a written document and thereafter submitted many documents to the Tribunal, all or most of which were responded to by Iran in writing. The purpose of requiring a written agreement is a statute of frauds type of requirement and is to assure that a default is not taken with respect to a party who didn't agree that particular disputes might be resolved by arbitration. A party initiating an arbitration cannot be said not to have agreed to it, and the submission of the initiating petition is



sufficient evidence of that agreement.

In any event, the United States government did agree to it and Gould's filing of its petition would at least constitute Gould's ratification of the agreement of the United States on its behalf, and so constitute an agreement on the part of Gould.

Had Gould not wanted to initiate a Tribunal proceeding it could have sought another forum such as the Claims Court or another jurisdiction such as England. The Executive, in the exercise of its foreign policy powers removed the case from the District Court in which it was originally filed but this no more vitiates the "voluntariness" of Gould's filing at the Tribunal than do other more ordinary

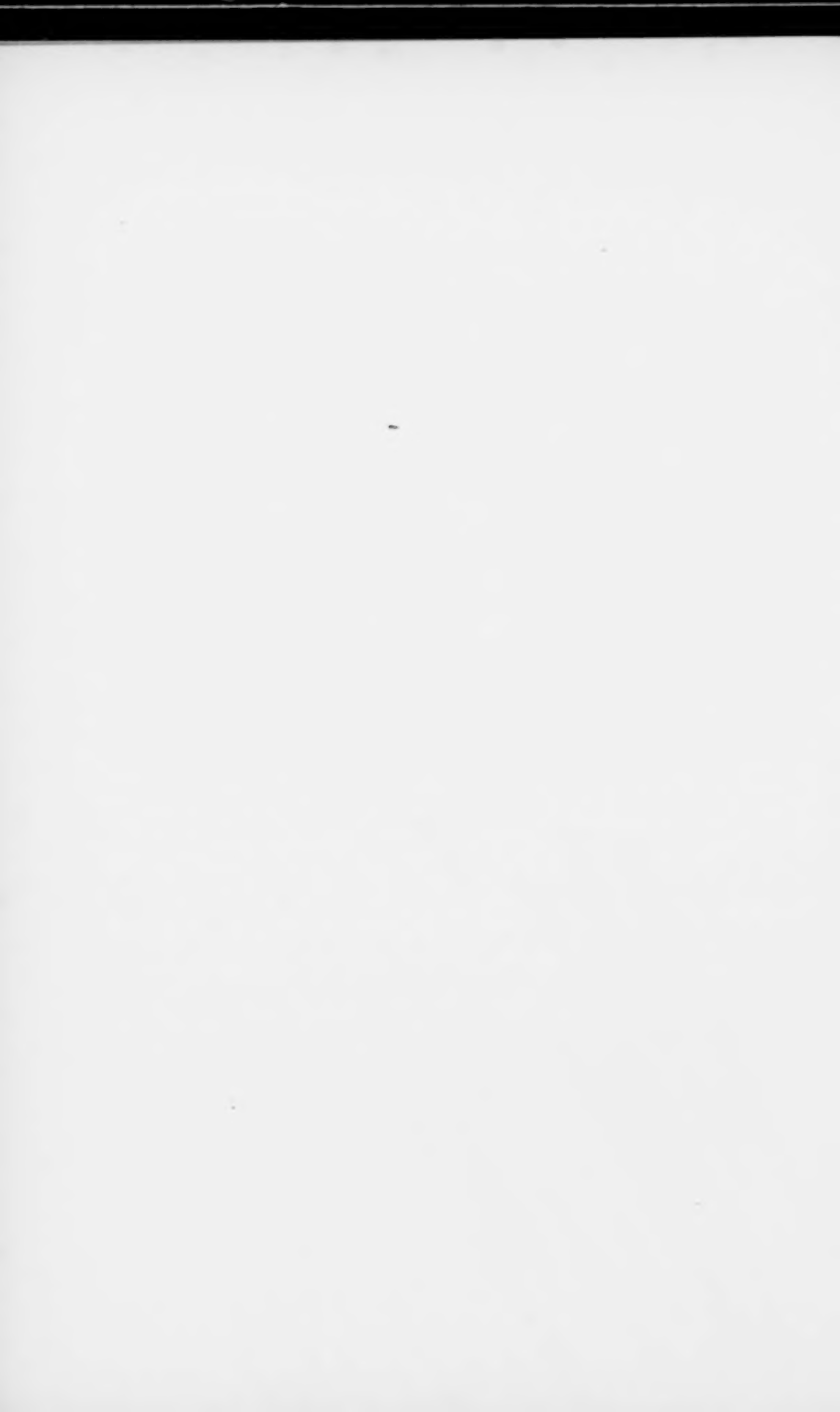


restrictions of jurisdiction, venue, etc. Because Iran could not initiate an action against Gould in the Tribunal Gould had the luxury of doing nothing at all and so avoiding the adjudication of Iran's claims against it. It chose, however, to initiate the arbitration and now cannot say that it did not agree to it.

The purpose of arbitration is to reduce the litigation burden on the judicial system and to simplify the resolution of disputes. The purpose of the Convention is to permit judicial enforcement of awards against parties who having submitted to the presumably simpler and less complex proceeding of arbitration now refuse to abide by the arbitrator's decision.



The thrust of Gould's argument is that additional layers of foreign and domestic law should be added to the process thereby adding to its complexity rather than reducing it. The Convention provides for adequate safeguards in the country in which enforcement is sought. Nothing is to be gained by metaphysical speculation as to the necessity and characteristics of a "nationality" of an award. The parties agreed to a procedure for the solution of their dispute. If it was carried out in accordance with that agreement in a signatory state other than the one in which enforcement is sought, it should be enforced if it meets the due process requirements spelled out in the Convention.



In any case Gould is estopped from questioning the "nationality" of the award because it failed to avail itself of the opportunity to raise the issue in the one forum competent to decide the matter - the Netherlands. Probably because the one court in the Netherlands that has considered the matter, the highest court in the Netherlands, has shown little sympathy for the position advanced by Gould.



ARGUMENT

This case raises no issues of general importance justifying the attention of this Court. The courts below have adequately addressed the issue of the enforceability of the award under the Convention. Their deliberations have been fully informed of the intentions of the Executive branch by representations of the State Department and the amicus brief of the Justice Department. Gould initiated the action in a forum not available to Iran as a court of first instance, the Iran-U.S. Claims Tribunal ("Tribunal"), and forced Iran to appear or face a possible default. In the event, the Tribunal found that the damages suffered by Iran exceeded those of Gould. Gould



should not be permitted to escape the adverse consequences of its imprudent act by further wasting the time of our courts in an attempt to avoid payment of its just debts.

The Convention was intended to permit satisfaction of arbitral awards made within the territories of signatory states so long as (as adopted by the United States - See 9 USC §202) they arise out of commercial disputes. The subject of this petition is such an award.

I.

1. The arbitration was conducted pursuant to a voluntary written agreement under the terms of the Convention.

Paragraph 2 of Article II of the



Convention provides that the term "agreement in writing" shall include "an exchange of letters or telegrams". It is clear from the plain meaning of this provision that the communications initiated by Gould and responded to by Iran, directly and through the Tribunal, were adequate to constitute an agreement under the Convention. It is patently absurd to contend that the party initiating the arbitration did not agree to it.

Article II is clearly intended to permit a party who does not desire arbitration to abstain from appearing without prejudicing his right later to raise the issue that he had never agreed to it. The enumeration of factors, not



necessarily exclusive, constituting an agreement simply recognizes the fact that an agreement may be had in various ways that would justify holding a non-appearing defendant to what is, in effect, a default award. Gould initiated the instant arbitration, participated in it over an extended period of time, filed many papers, briefs and arguments, and appeared for oral argument. To maintain that it did not agree to the arbitration, or that it agreed only to an arbitration in which it would be successful, may pose interesting metaphysical questions but has no place in the real world.

It can also be argued that the Claims Settlement Declaration itself is the agreement of the parties by each



government acting on behalf of itself and as agent of its nationals. If so, initiation of the arbitration by a national could be viewed as (i) the party availing itself of the valid agreement theretofore made by its government on its behalf; or (ii) ratification by the private party of its agent's prior agreement. See van den Berg, Proposed Dutch Law on the Iran-United States claims Settlement Declaration, a reaction to Mr. Hardenberg's Article. Int'l Bus Law 341 (Sept. 1984)

2. Gould was not required to submit its claim to the Iran-United States Claims Tribunal.

Gould has argued at length (Petition at 24-26) on the basis of language in a

case, Dallal v. Bank Mellat

1 All E.R. 239, 1 Q.B. 441 (1986)

addressing issues not before that court. The court's language in addressing issues germane to its decision, however, demonstrates that Gould would not have been foreclosed from suing in an English court so long as it did not abuse the privilege by trying to relitigate issues decided in a forum it had earlier selected.

Dallal, a United States national like Gould, had sued in the English courts on a cause of action that had already been decided adversely to him in an arbitration he had initiated at the Iran-United States Claims Tribunal. The English court had no trouble accepting jurisdiction of the



cause but found that the decision at the Hague was res judicata as to the issues considered there. In arriving at this decision the court said:

"It is true that he may have had no other alternative under the law of the United States if he wished to pursue his rights as he saw them. But that does not make it any the less a voluntary act. Most plaintiffs who commence proceedings are in a similar position. They have to commence proceedings in the appropriate municipal court or be without remedy. It can also be commented that before me Mr. Dallal has submitted that there



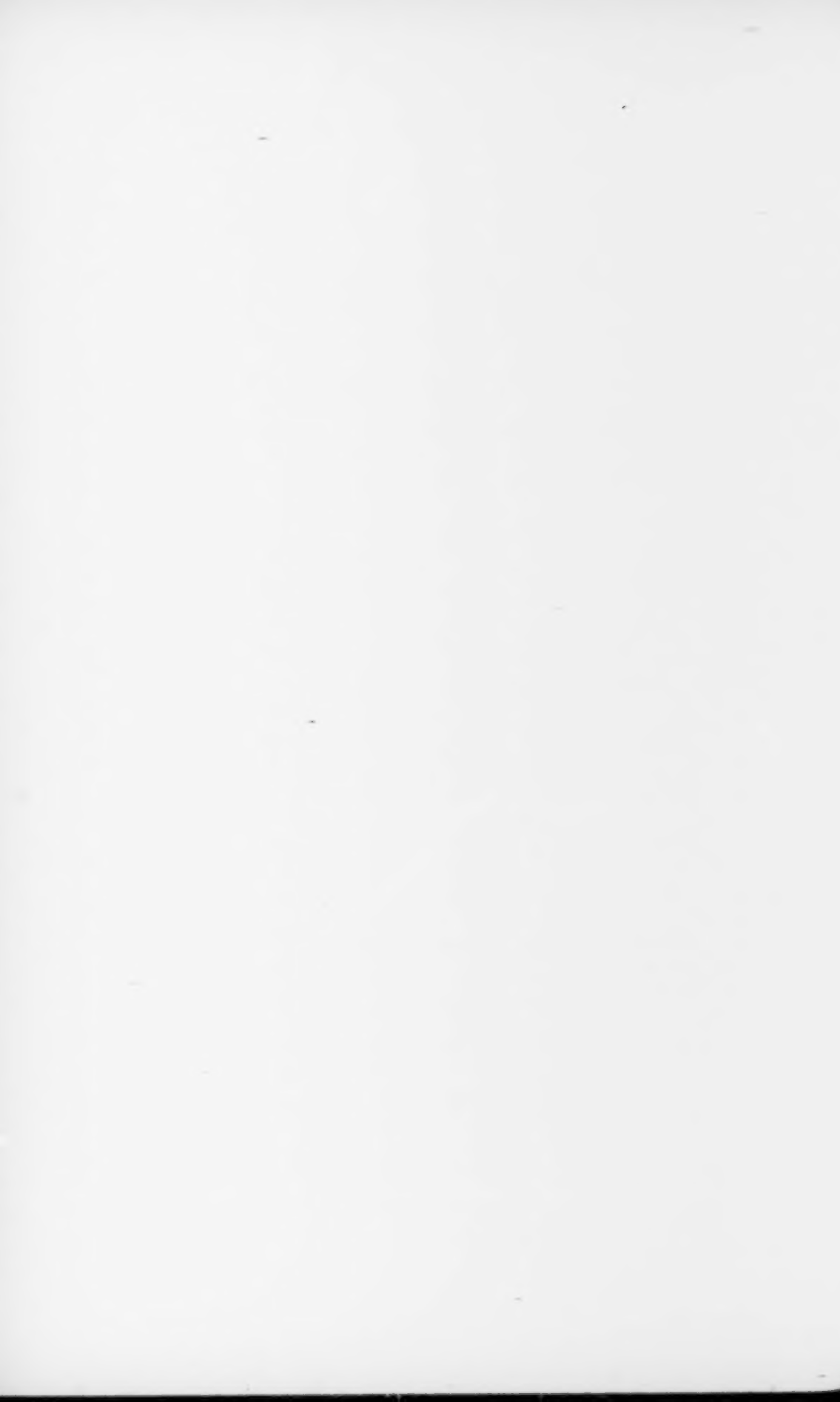
is nothing in United States law which prevents him from litigating the present matters in the courts of the United Kingdom. He says that is the position now and, as I understand his case, he does not suggest that the position was any different at the time that he chose to go to the Hague tribunal." id., at 254 and 460.

There is no reason to suppose that the court that welcomed Mr. Dallal's claim would have been less hospitable to Gould had it initiated its action there rather than in the Hague. Presumably other judicial systems might have been equally responsive to Gould's plight.

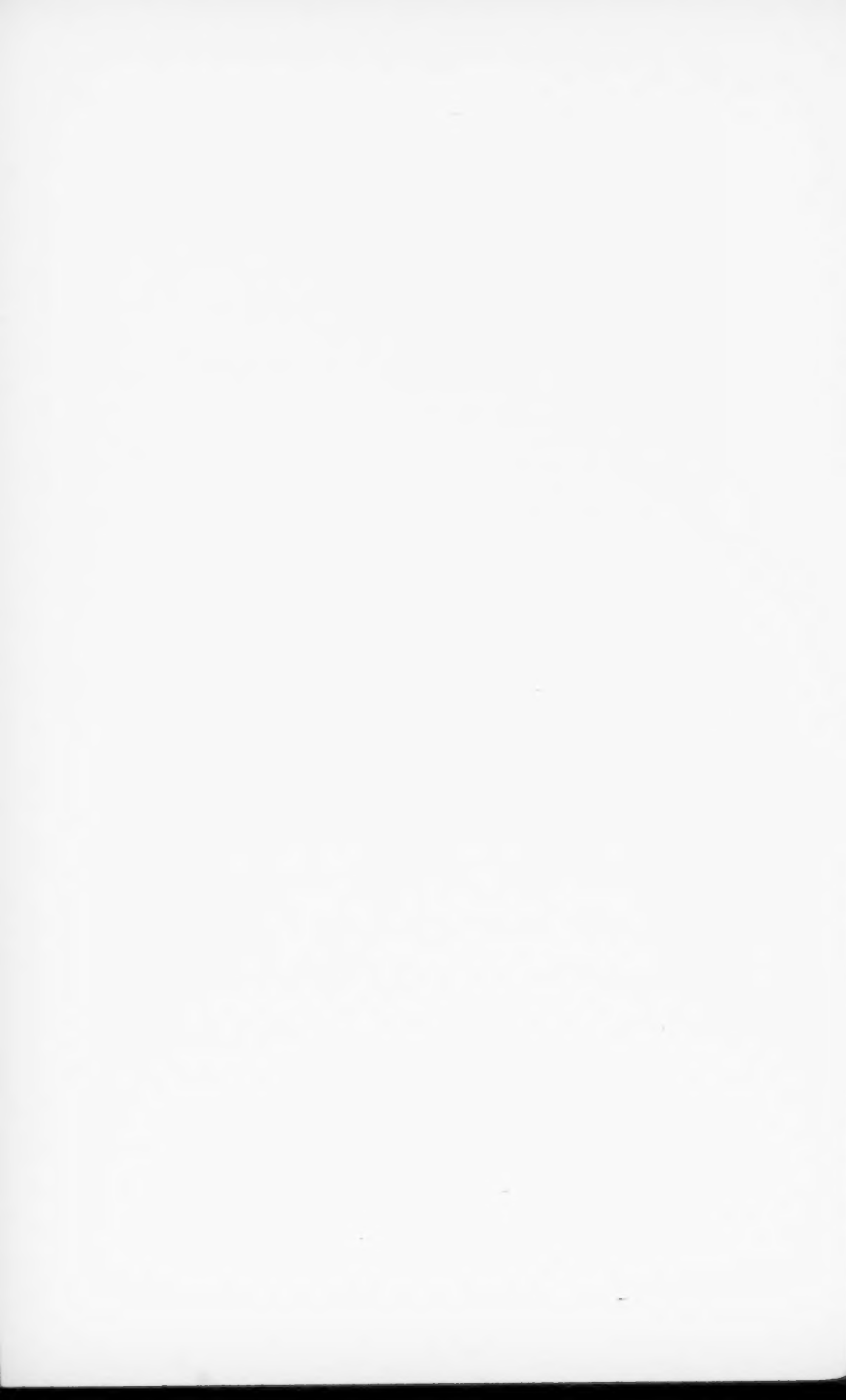


But it is not necessary to look abroad to appreciate the choices available to Gould. This Court has earlier addressed the claims of litigants that their rights have been abridged by the Executive's exercise of its foreign policy powers:

"Accordingly, to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." Dames & Moore v. Regan 453 U.S. 654, 689-690 (1981). Thus it would appear that far from



reducing Gould's choices, it had two more after the President's action than it had before, viz., it had the action at the Hague which the President, in the exercise of his power over foreign affairs, substituted for the normal District Court action; it had a residual action in the District Court if the action at the Hague "failed of its essential purpose" Security Pacific Nat'l Bank v. Government & State of Iran 513 F. Supp. 864,884 (C.D. Cal 1981); and it had the Claims Court action. No doubt Gould carefully weighed the relative merits of the various courses. In weighing them the relative certainty of the availability of the security account for satisfaction of an award must have been a significant factor. As this



Court has pointed out the existence of the Tribunal assured a United States party initiating an action there "that any award made to it whether the result of a settlement or otherwise could be enforced in the courts of any nation and actually paid in this country....[Otherwise, such a party] would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectible." United States v. Sperry ____U.S.____, 110 S.Ct. 387, 395 (1989).

Gould had yet another option not hitherto discussed. That option was to do nothing. If it had been truly "forced" to appear at the Tribunal the issue between Iran and Gould could have been



decided whether or not it appeared, with Iran in the position of being able to obtain a default award in the event of Gould's non-appearance. Under the terms of the Claims Settlement Declaration, however, only a national of one of the state parties may invoke the jurisdiction of the Tribunal against the other state party; a state party has no right to invoke the jurisdiction against a national of the other state. Claims Settlement Declaration Article II.1. Far from being "required" to resort to the Tribunal, Gould calculated the various options available at home and abroad and freely and eagerly chose what it must have considered to be the most attractive. Unfortunately, its claim was not



meritorious.

II.

1. The award was "made in the territory of another Contracting State".

It is difficult to see how there can be a question regarding the meaning of the term "made in the territory". "Territory" does not have any legal or jurisdictional connotation. To the extent that it does have any reference to a legal system it usually connotes a status outside the normal legal or jurisdictional system with which it is associated, as in "Northwest Territory" or "Oklahoma Territory". Given the variety of legal formula available to the drafters of the Convention, such as "in accordance with the arbitration laws



of another Contracting State", etc., it would seem sensible to adopt the plain meaning of the words, viz., made within the geographical limits of another state. The Convention is replete with other provisions that assure that a litigant will not be subjected to an illegal proceeding or one that would transgress the limits of fairness. See, for example, Article V.

2. An award rendered by the Iran-United States Claims Tribunal is enforceable without regard to whether its validity may be challenged or established under municipal law of the country within which it is rendered.

The highest court of the Netherlands



is one of the few courts to address this issue, and because of its location its views are particularly germane to this case. It opined that non-national and a-national awards are, in principle, enforceable under the Convention. See, Societe Europeene d'Etudes et d'Enterprises v. Socialist Federal Republic of Yugoslavia, Hoge Raad , October 26, 1973, 14 Int'l Leg. Materials 71 (1975).

The fact that "non-national" awards may not be susceptible to being set aside by a municipal court is irrelevant for purposes of determining the scope of the Convention. Article V(1)(e) of the Convention only provides that an award that has been actually set aside cannot



be enforced. This defense against enforcement arises from the choice of the parties to subject their arbitral proceedings to the procedural rules (including safeguards) of a national jurisdiction. In contrast, in the case of a truly "non-national" award, the parties have opted not to subject the proceeding to local judicial oversight and, hence, cannot complain of a lack of supervision by municipal courts over their arbitral proceedings. In addition, it should be noted that the Convention itself contains certain safeguards, e.g., Article V(1)(b), V(2)(b), which can be applied by the enforcing State to insure the requisite fairness in arbitral awards subject to enforcement under the Convention. See



also G. Gaja, International Commercial Arbitration: The New York Convention §I.C.3.

III. Gould is estopped from raising the issue of the validity of the award under Dutch law because it failed to raise it in a timely manner in the proper forum, the Netherlands.

Once again, Gould is in the unenviable position of urging that the forum it chose, and forced Iran to appear in to avoid the risk of having a default taken, is not competent to render a valid award. Moreover, it requests this court to make determinations of Dutch law on subjects that are not clearly settled in Dutch law, and to the extent they are addressed, seem to be contrary to the



contentions of Gould. Societe Europeene,
supra.

This is particularly troubling because if Gould actually had confidence in the proposition it asserts here it could have raised the issue in a forum peculiarly well suited to make an authoritative ruling on the matter - the Dutch courts. Under Dutch law an action could have been brought in the Dutch courts within three months of the issuance of the award to have it set aside. See IV Dutch Code of Civil Procedure 1064(3) (1986). Gould's failure to seek the most authoritative declaration of the state of Dutch law in the matter is a clear demonstration that it has little faith in the argument it puts forth.



CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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